

# BID PROTESTS AND CONTRACT CLAIMS

## I. Bid Protests

The key to government procurement is competition. Procurement staff at DHMH believe that when multiple suppliers vie for our business, the State is much more likely to get a good product at a good price. Because most procurements result in only one contract award, the fact is, that no matter how low you try to bid, or how good your proposal is, you will not always be the successful bidder/offeror. In rare instances, the fact that you were not selected may be the result of a flawed solicitation.

If you, the vendor, believe that the solicitation document was defective, the procurement process was corrupted in some way, or that you were treated unfairly, procurement regulations provide for your right to protest and to appeal the decision. Keep in mind, there must be valid reasons for your protest. The following reasons are often used as the grounds for protests of awards, but are almost always denied, both at the protest level and the appeals level.

“The winning vendor does not meet the minimum requirements.”

“The winning vendor cannot do the work required at the amount they bid.”

“The evaluation committee did not give my proposal fair consideration.”

“The State made unfair changes to the IFB/RFP during the solicitation.”

State Procurement Regulations<sup>1</sup> provide for the protest of solicitations and contract awards in COMAR 21.10.02<sup>2</sup>. All protests must be in writing and addressed to the Procurement Officer. They must contain the name and address of the protestor, identification of the procurement, i.e. the solicitation or contract number and Title, the reasons for the protest and any supporting exhibits or other forms of evidence or documentation to substantiate the reasons for the protest. Protests based upon alleged improprieties in a solicitation apparent before bid opening or the closing date for receipt of initial proposals, must be filed before bid opening or the closing date for receipt of initial proposals. For procurements by competitive sealed proposals (the method which uses an RFP), alleged improprieties that did not exist in the initial solicitation but which are subsequently incorporated in the solicitation must be filed no later than the next closing date for receipt of proposals following the incorporation. In cases other than those already covered,

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<sup>1</sup> To see a copy of Maryland's procurement regulations, go to COMAR On-line at the Division of State Documents website: <http://www.dsd.state.md.us>.

<sup>2</sup> The Code of Maryland Regulations is always cited by Title, Subtitle, Chapter, Sub-chapter and Paragraph. Thus, Code of Maryland Regulations, Title 21 (State Procurement Regulations), Subtitle 10 (Administrative and Civil Remedies), Chapter 2 (Protests) is cited COMAR 21.10.02.

protests must be filed no later than 7 calendar days<sup>3</sup> after the basis for protest is known or should have been known, whichever is earlier. The deadlines established by COMAR must be strictly observed. Many protests are never considered on their merits because they were summarily rejected as a result of being late.

## **II. Contract Claims and Disputes**

A contract is an agreement between two or more parties that determines, among other things, what, when and how each party will do certain things. When one of the parties to a contract feels they are not being treated fairly by the other party, or if a party feels the other is not meeting its obligations, contract disputes arise. To address such disputes, Maryland Procurement Regulations provide for the filing of contract claims under COMAR 21.10.04.

Either party to a contract may file a claim. As with protests, there are deadlines within which a claim must be filed. Unless a lesser period is prescribed by law or by contract, the concerned party must file a written notice of a claim relating to a contract with the appropriate procurement officer within 30 days after the basis for the claim is known or should have been known, whichever is earlier. The actual claim itself must be filed within 30 days of the notice filing but no later than the date that final payment is made. The claim must contain:

- a. An explanation of the claim, including reference to all contract provisions upon which it is based;
- b. The amount of the claim;
- c. The facts upon which the claim is based;
- d. Any pertinent data and correspondence the contractor relies upon to substantiate the claim; and
- e. A certification by a senior official, officer or general partner of the contractor or the subcontractor as applicable, that to the best of the person's knowledge and belief, the claim is made in good faith, supporting data is accurate and complete, and the amount requested accurately reflects the contract adjustment for which the person believes the procurement agency is liable.

The procurement officer will investigate the facts pertinent to the claim. If needed, the procurement officer can request additional information, or require substantiation of information provided by the contractor. Claims are decided in much the same manner as protests, except that in the case of settled claims, a settlement agreement is drawn up. If a claim is not settled, the procurement officer will prepare a recommended decision on the claim. This would contain:

- a. A description of the claim;
- b. A reference to pertinent contract provisions;
- c. A statement of factual areas of agreement or disagreement;
- d. A statement of the proposed decision, with supporting rationale; and

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<sup>3</sup> COMAR 21.01.02.01 (32) defines "Day" as a calendar day unless otherwise noted in regulations.

- e. A paragraph stating that this is the final action by the agency and that the contractor may appeal the claim to the Maryland State Board of Contract Appeals (see COMAR 21.10.04.04).

All correspondence with all concerned parties will be sent via certified mail. Should the claimant appeal the decision, the appeal must be filed within 30 calendar days from the date the procurement agency's decision was received by the claimant.

### **III. Appeals**

As mentioned above, prospective contractors and contractors may appeal decisions made by procuring agencies. All procurement appeals are filed with the Maryland State Board of Contract Appeals (MSBCA). COMAR 21.10.06 provides for the appeal of contract disputes, and COMAR 21.10.07 provides for the appeal of protests. In each case, the notice of appeal must be in writing and must be delivered or mailed, via certified mail, to MSBCA. The content for each notice is listed in the regulations cited.

#### **Appeal of Protest Denial**

In the case of a solicitation or award protest, the appellant has 10 calendar days to appeal a final decision of the procuring agency. The notice of appeal must be in writing and should contain:

- a. The name and address of the protester;
- b. The identity of the contracting agency, the solicitation number and title, and, if awarded, the contract;
- c. A statement of the grounds of appeal; and
- d. The specified ruling requested (by the appellant) from the Appeals Board.

The appellant should attach a copy of the procurement agency's final action from which the appeal is being taken and any supporting documents it feels are pertinent or which support its case. If all documents are not available, they should at least be named in the appeal and an estimated date of availability stated.

The Appeals Board notifies the procuring unit within 1 day of the filing of an appeal, after which the procuring unit must advise all interested parties of the appeal, particularly those bidders or offerors that appear to have a reasonable chance of being awarded a contract if the appeal is denied. The Office of the Attorney General, in conjunction with the procuring agency, then submits a complete report on the actions taken by the agency with regard to the solicitation involved in the appeal. This is done as quickly as possible with a copy of the report being sent to the protester and other interested parties.

The appellant then has 10 days after receipt of the agency report to comment on it, after which the procuring agency has 5 days after receipt of those comments to rebut the comments. The Appeals Board may rule on the report, or if requested by either party, a hearing may be held. To see the complete regulations governing award protests, go to the Division of State Documents website and access COMAR On-line at: <http://www.dsd.state.md.us>.

## **Appeal of Claim Denial**

Filing deadlines and required documentation for an appeal of a contract dispute are different from those of a solicitation or award protest. The appellant has 30 days from notice of final action to appeal a contract dispute.

The appellant then has 30 days to supplement the file with any additional documents or information it deems pertinent. The appellant must also file a complaint within 30 days after receipt of notice of docketing. The contracting agency, through the Office of the Attorney General, then has 30 days after notice of receipt of complaint to respond with a statement of defense. The parties may elect to have a hearing, or allow the Appeals Board to rule on the statements. The complete regulations governing procedures for appealing contract disputes may be viewed by accessing COMAR On-line within the Division of State Documents Website at: <http://www.dsd.state.md.us>.